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In the Supreme Court of the United States

OCTOBER TERM, 1996

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., PETITIONER

v.

FREDERICK L. FEINSTEIN, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the district court has subject matter jurisdiction to review or enjoin the prosecution of an unfair labor practice complaint by the General Counsel of the National Labor Relations Board, where it is alleged that such prosecution breaches an agreement between the General Counsel and the charged party as to the manner in which the General Counsel would exercise his prosecutorial discretion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 103 F.3d 151. The opinion of the district court (Pet. App. 17a-22a) is reported at 132 Lab. Cas. ¶ 11,613

JURISDICTION

The court of appeals entered its judgment on December 31, 1996. A petition for rehearing was denied on March 4, 1997. The petition for a writ of certiorari was filed on June 2, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (NLRA) provides that "[i]t shall be an unfair labor practice" for an employer or labor organization to engage in conduct that infringes in specified ways upon the rights guaranteed employees under the Act. 29 U.S.C. 158. The Act confers upon the National Labor Relations Board (Board) the authority "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a). It further states that the Board's General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of [unfair labor practices] and issuance of complaints * * *, and in respect of the prosecution of such complaints before the Board." 29 U.S.C. 153(d).

An unfair labor practice case is initiated by the filing of a charge with the regional director of the Board for the region in which the alleged unfair labor practice occurred. If a settlement cannot be reached in a case that the regional director has found to be meritorious, the regional director, acting on behalf of the General Counsel, issues a complaint. The charged party must file an answer and is entitled to a hearing before an administrative law judge (ALJ). After the hearing, the ALJ makes a recommended decision, which is subject to review by the Board. 29 U.S.C. 160(b)-(d); 29 C.F.R. 101.10-101.15, 102.20-102.50. "Any person aggrieved by a final order of the Board" may obtain judicial review in the courts of appeals. 29 U.S.C. 160(f).

2. Petitioner is a long-term health care company that operates more than 703 individual facilities in 33 States and the District of Columbia. Pet. App. 2a.

Beginning in 1986, the General Counsel issued unfair labor practice complaints against petitioner and its affiliated entities. Pursuant to provisions of the Board's Rules and Regulations, 29 C.F.R. 102.33(a)(2), the General Counsel consolidated the cases into three groups. In the first group of cases, the Board found that petitioner had committed more than 130 violations of the Act at 32 facilities and ordered nationwide relief that included corporate-wide posting of notices and cease and desist orders at all of petitioner's nursing homes. *Beverly Cal. Corp.*, 310 N.L.R.B. 222, 228, 231-232 (1993). On appeal, the Second Circuit enforced most of the Board's decision and order, but denied enforcement of the nationwide remedial order. *Torrington Extend-A-Care Employee Ass'n* v. *NLRB*, 17 F.3d 580, 596 (1994). A second and third group of cases involving 30 of petitioner's facilities are pending before the Board on appeal from ALJ decisions. Pet. App. 172a, 176a.

On March 22, 1995, the General Counsel and petitioner entered into an agreement regarding the handling of other unfair labor practice charges against petitioner. The agreement provided that other cases against petitioner would be handled on an individual basis, would not contain allegations that petitioner was a "single employer," and would not seek nationwide remedies. Pet. App. 2a. The agreement provided, however, that the General Counsel could consolidate cases under certain conditions, such as "for reasons of efficiency or convenience of counsel or witnesses." *Id.* at 177a.

On March 14, 1996, the Board's Regional Director for Region 6, on behalf of the General Counsel, issued an order consolidating three complaints that relate to petitioner's facility in Pennsylvania known as the

Grandview Healthcare Center and 19 other Pennsylvania facilities. Pet. App. 2a, 33a-56a. On March 29, 1996, petitioner filed a civil action against the General Counsel in the United States District Court for the District of Columbia, seeking compensatory damages and an injunction requiring the General Counsel to withdraw the consolidated unfair labor practice complaint and to "issue any Complaint on new allegations only in conformance with the Agreement." *Id.* at 31a. The Regional Director subsequently postponed the hearing on the consolidated complaint, and the General Counsel gave ten days notice of his intention to terminate the agreement, as permitted by the agreement's terms. After the termination of the agreement, the Regional Director issued a second consolidated complaint that included additional unfair labor practice charges against petitioner. *Id.* at 3a.

3. The district court dismissed petitioner's suit for lack of subject matter jurisdiction. Pet. App. 16a-22a. The court reasoned that "[i]t is well settled that a federal district court does not have jurisdiction to enjoin or restrain the Board or its agents from conducting unfair labor practice proceedings." *Id.* at 19a. The court further explained that "[i]f and when this case reaches the adjudicatory stage, [petitioner] will have ample opportunity to raise any arguments concerning [the General Counsel's] breach of the Agreement before an Administrative Law Judge, the Board, and then before a court of appeals." *Id.* at 20a-21a. Additionally, relying on this Court's decisions in *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 130 (1987), and *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975), the district court concluded that "the conduct at issue

here is an exercise of prosecutorial discretion, which is not reviewable in this Court." Pet. App. 21a.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court held that the General Counsel's conduct in "issu[ing] a complaint" is not subject to district court review, because the NLRA "does not authorize judicial review of the General Counsel's decision to file or withdraw a complaint." *Id.* at 5a. The court further ruled that the "fact that the General Counsel's exercise of his statutory powers may violate [petitioner's] contract rights does not in itself render the NLRA's jurisdictional limitations inapplicable." *Id.* at 8a. Rather, the court explained that the General Counsel's "decision to prosecute the alleged violations in a particular manner is effectively reviewed through the ordinary administrative review scheme" after "the Board reaches a final disposition of the underlying charges." *Id.* at 10a.

ARGUMENT

1. Petitioner contends (Pet. 14) that Sections 1331 and 1337(a) of Title 28 provide the district court with jurisdiction over petitioner's breach of contract claims against the General Counsel because the agreement "arises from federal law." It is well settled, however, that the NLRA does not provide for judicial review of the General Counsel's prosecutorial decisions, including the filing or withdrawing of an unfair labor practice complaint. See *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124-126, 131 (1987); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

In this case, petitioner seeks an injunction ordering the General Counsel to withdraw the complaint

against petitioner. Pet. App. 31a. As the court of appeals stated, the General Counsel's decision to issue a complaint "is a quintessential example of a prosecutorial decision. It involves a balancing of culpability, evidence, prosecutorial resources, and the public interest." *Id.* at 6a. Accordingly, the court of appeals properly concluded that "[t]he civil action filed by [petitioner] plainly conflicts with the General Counsel's authority to issue complaints" (*id.* at 8a) and the district court therefore lacked jurisdiction over petitioner's civil action to enjoin the General Counsel's issuance of the unfair labor practice complaint against petitioner.[1]

2. Petitioner also contends (Pet. 9-11) that the decision below conflicts with this Court's decision in *United States* v. *Winstar Corp.*, 116 S. Ct. 2432 (1996), which held that the government was liable for breach of contract with certain thrift institutions, notwith-

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[1] Petitioner suggests (Pet. 20-21) that this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), provides the district court with jurisdiction over this case. As petitioner conceded below (Pet. C.A. Br. 13), however, "[t]his is not a *Leedom* v. *Kyne* case." In *Leedom* v. *Kyne*, the Court held that a district court had jurisdiction to vacate the Board's certification of a bargaining unit that was in violation of 29 U.S.C. 159(b)(1). The Court explained that the Board's decision was "made in excess of its delegated powers and contrary to a specific prohibition in the Act," 358 U.S. at 188, and was not a final order otherwise subject to the judicial review provisions under the Act, *id.* at 190-191. Unlike in *Kyne*, the General Counsel's decision to file a consolidated complaint against petitioner is not alleged to have violated any provision of the Act. See Pet. C.A. Br. 13 ("Nothing in the Complaint alleges any breach of a mandatory duty in the Act."). Additionally, any adjudication that results in a final Board order unfavorable to petitioner is subject to judicial review under 29 U.S.C. 160(f).

standing a subsequent change in the relevant law which barred the government from honoring those contracts. The decision below does not hold, however, that the General Counsel is released from the agreement with petitioner. See Pet. App. 10a ("Of course, it is not the fact that the General Counsel can freely abjure his contractual obligation."). Rather, the court held that although petitioner may not enjoin the General Counsel's filing of a complaint, petitioner may raise its contentions "on the merits" in the underlying unfair labor practice proceeding before the Board, and "the Board's decision on the matter will in turn be entitled to judicial review by the Court of Appeals." *Id.* at 11a. Indeed, petitioner has raised its agreement with the General Counsel as an affirmative defense to the second consolidated complaint. *Id.* at 10a. Thus, petitioner "will, if necessary, have its day in court on the charging issue." *Id.* at 11a.

Similarly, there is no merit to petitioner's further contention (Pet. 13) that unless it "can actually obtain * * * speedy judicial review" of the General Counsel's decision to prosecute in this case, petitioner is deprived of its "Fifth Amendment property right arising from a contract with the government." This Court long ago held that the procedural provisions of the NLRA afford "adequate opportunity to secure judicial protection against arbitrary action" (*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937)) and, therefore, that "Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals" (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938)). Accordingly, petitioner has no property or other right to have a court consider its contention that the General Coun-

sel breached its agreement by filing the first and second consolidated complaints, "until the prescribed administrative remedy has been exhausted." *Myers*, 303 U.S. at 50-51.

3. Citing *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 212-213 (1994), petitioner contends (Pet. 16) that it may obtain direct judicial review of the General Counsel's decision to issue complaints against petitioner because its "breach of contract claim is 'wholly collateral' to the judicial review provision of the NLRA, and is quite 'outside the agency's expertise.'" There is no merit to that contention.

The agreement allegedly violated by the General Counsel relates to the investigation and prosecution of unfair labor practice cases against petitioner. Pet. App. 2a. As the court of appeals correctly observed (*id.* at 6a), the relief sought by petitioner's complaint seeks to recast the pending unfair labor practice proceeding in order to conform it to petitioner's interpretation of the agreement. Thus, the propriety of the consolidated complaint as filed is not "wholly collateral" to the pending administrative proceeding. Moreover, petitioner's suit raises matters within the Board's expertise, because it alleges that the General Counsel breached its agreement to file unfair labor practice complaints in accordance with the Board's normal procedures for handling and settling such complaints and not to include in those complaints allegations of single employer status or requests for nationwide remedies. *Id.* at 27a-28a. Those allegations relate to the day-to-day handling of unfair labor practice cases and are of direct concern to the Board, which has the ultimate responsibility for ensuring the proper and fair administration of the NLRA. See

29 U.S.C. 160(a).[2] Petitioner's claim, in short, concerns nothing more nor less than the propriety of a complaint by the General Counsel pending before the Board. Thus, the court of appeals properly concluded that petitioner was required in the first instance to present its contract claim to the Board.[3]

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[2] Although petitioner correctly notes (Pet. 17-18) that the Board does not have plenary authority to administer and enforce collective bargaining agreements, the agreement at issue here does not set forth collectively bargained terms and conditions of employment. Indeed, it is not an agreement with a bargaining representative; nor is it a collective agreement.

[3] Contrary to petitioner's suggestion (Pet. 18-19), the decision below does not conflict with *Alabama Power Co.* v. *FERC*, 993 F.2d 1557 (D.C. Cir. 1993). There, the court held it had jurisdiction to review a Federal Energy Regulatory Commission order to investigate a company's rate schedule that was allegedly in breach of a settlement agreement between the company and FERC. Unlike here, however, the order was issued by the Commission itself, not by any prosecutorial arm of the agency, and thus it was a "final" order for purposes of the judicial review provision of the Federal Power Act. 993 F.2d at 1566-1567. Compare *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980) (Federal Trade Commission's issuance of complaint is not final agency action and therefore not judicially reviewable before the conclusion of the administrative adjudication). In the present case there has been no final order of the Board within the meaning of 29 U.S.C. 160(e) and (f). The court below therefore correctly concluded (Pet. App. 9a-10a) that *Alabama Power* is inapposite. In any event, any intra-circuit conflict between the decision below and *Alabama Power* would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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